Filed 9/25/15 P. v. Carson CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAVANTE J. CARSON, Defendant and Appellant.	A139953 (Contra Costa County Super. Ct. No. 51308329) ORDER MODIFYING OPINION AND DENYING REHEARING [NO CHANGE IN JUDGMENT]

BY THE COURT:

It is ordered that the opinion filed herein on August 28, 2015, be modified as follows:

1. On page 2, the first sentence of the second full paragraph shall be modified to read as follows:

   Ten months later, in April 2013, a group of approximately 10 men, including defendant, appeared to be standing in the parking stall of a cul-de-sac, and "in the circle" were "playing dice, shooting dice."

2. On page 6, the third paragraph is modified to read as follows:

   Under *Pringle, supra,* 540 U.S. at pages 371–374, and *Hughes, supra,* 240 Cal.App.2d at pages 616–617, there was probable cause to arrest defendant

for gambling. He was a part of a distinct, 10-person group standing in a parking stall around dice and money. The evidence suggests defendant was not simply near the group—he was not merely walking or parked nearby. Rather, the evidence suggests he was an integrated part of it.

3. On page 6, the first sentence of the fourth paragraph shall be modified to read as follows:

Furthermore, the police observed more than the discrete group of men in the parking stall around the dice and money.

There is no change in the judgment.

The request for judicial notice is hereby denied.

The petition for rehearing is denied.

Dated:

_____

Humes, P. J.

Filed 8/28/15 (unmodified version)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. DAVANTE CARSON, Defendant and Appellant.	A139953 (Contra Costa County Super. Ct. No. 5-130832-9)

Appellant and defendant Davante Carson appeals from a judgment of conviction, following a jury trial, of two counts of unlawfully carrying a loaded firearm (Pen. Code, § 25850, subds. (a), (c)(6))[1] and one count of street terrorism (§ 186.22, subd. (a)). Defendant contends the trial court should have suppressed evidence recovered from his cell phone, which the police searched without a warrant following his arrest. He also contends the court abused its discretion in denying a midtrial continuance so he could attempt to find a witness willing to connect a third party, rather than defendant, with the gun at issue in one of the firearm charges. We conclude the police had probable cause to arrest defendant and the exclusionary rule does not apply to the cell phone search here because the police acted in good faith reliance on California Supreme Court authority. We further conclude the trial court did not abuse its discretion in denying a continuance, and therefore affirm the judgment.

[1] All further statutory references are to the Penal Code unless otherwise indicated.

BACKGROUND

In June 2012, police officers, while on patrol, observed defendant take an item from a car trunk, put it under his waistband, and manipulate it as if it were a gun. Defendant appeared nervous and was looking up and down the street. An officer stopped defendant and conducted a pat search which revealed an unregistered, loaded Glock pistol at defendant's waist. He was arrested, and charged with personally and publicly carrying a loaded firearm not registered to him. (§ 25850, subds. (a), (c)(6).)

Ten months later, in April 2013, a group of approximately 10 men, including defendant, appeared to be standing in a circle, "playing dice, shooting dice." Both dice and money were on the ground. Several officers coordinated their efforts and approached the group. The men, including defendant, fled, and were eventually detained and arrested. Defendant's cell phone was seized at the time of his arrest. The police also found two firearms by trash bins about 20-25 feet from where the group had been standing. One was a loaded Glock pistol with a unique laser sight in clean working order.

Later, at the police station, and just before interviewing defendant, an officer reviewed the images on defendant's cell phone. Several showed a Glock pistol. For instance, there were pictures of individuals related to defendant holding what appeared to be the found Glock. There were pictures of defendant's brother holding two Glock pistols, of defendant wearing a Cincinnati Reds baseball hat (a symbol of a Richmond gang called "Deep-C"), and of a Glock pistol with a laser sight like the one confiscated, plus another pistol and a Cincinnati Reds hat. Text messages on the phone showed defendant and his brother discussed having a "hamma," a slang term for gun.

Based on the pictures, texts, the identities of the other gamblers, and other evidence, police believed defendant was a member of Deep-C and that having the Glock nearby would benefit the gang, which was likely poised for violence in the wake of a shooting earlier that day.

Further investigation revealed the found Glock was not registered to defendant.

In connection with this incident, defendant was again charged with unlawful carrying of a loaded firearm not registered to him (§ 25850, subds. (a), (c)(6)) and also with street terrorism (§ 186.22, subd. (a)).

In a consolidated trial, a jury convicted defendant of the two gun charges and the one street terrorism charge and found true various enhancements. The trial court suspended imposition of sentence and placed defendant on three years' probation with various terms and conditions, including serving a year in county jail.

Defendant seeks reversal of his convictions for the April 2013 gun and street terrorism charges, but does not challenge his conviction for the June 2012 gun charge.

DISCUSSION

Suppression Motion

At the outset of trial, defendant made a motion to suppress the evidence obtained as a result of the warrantless search of his cell phone, arguing there was no probable cause for his April 2013 arrest and therefore the search could not be sustained as incident to a lawful arrest.[2] The court heard the motion midtrial, after the prosecution rested. Defendant argued the prosecution failed to present sufficient evidence he had been engaged in any unlawful conduct while part of the group of men hanging around the dice and money. The prosecutor asserted the officers had ample grounds to arrest defendant for gambling and violating his on-bail conditions (stemming from the June 2012 arrest), and therefore the search of defendant's cell phone data was proper. The trial court denied the motion to suppress.

" 'The Fourth Amendment provides "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . . ." (U.S. Const., 4th Amend.) This guarantee has been incorporated into the Fourteenth Amendment to the federal Constitution and is applicable to the states. [Citation.] A similar guarantee against unreasonable government searches is set forth in

[2] Several months earlier, defendant had moved, unsuccessfully, to suppress evidence in connection with his June 2012 detention, search, and arrest. Defendant does not challenge the trial court's handling of that motion.

the state Constitution (Cal. Const., art. I, § 13) but, since voter approval of Proposition 8 in June 1982, state and federal claims relating to exclusion of evidence on grounds of unreasonable search and seizure are measured by the same standard. [Citations.] "Our state Constitution thus forbids the courts to order the exclusion of evidence at trial as a remedy for an unreasonable search and seizure unless that remedy is required by the federal Constitution as interpreted by the United States Supreme Court." ' (*People v. Camacho* (2000) 23 Cal.4th 824, 829–830 . . . .)" (*People v. Stillwell* (2011) 197 Cal.App.4th 996, 1004.)

" ' "The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment." ' [Citations.]" (*People v. Suff* (2014) 58 Cal.4th 1013, 1053; see also *People v. Price* (1991) 1 Cal.4th 324, 409 [same standard of review governing the related determination that a warrantless arrest was based on probable cause].) A suppression motion ruling "will not be disturbed on appeal merely because given for a wrong reason." (*People v. Walker* (2012) 210 Cal.App.4th 1372, 1383, internal quotation marks omitted.) "If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion." (*Ibid.*, internal quotation marks omitted.)[3]

[3] The trial court's order denying defendant's motion is less than helpful. It uses language pertaining to a *detention* (i.e. reasonable suspicion), while both parties have always recognized the issue is whether police had probable cause to *arrest*. The order also appears to rely on a theory of inevitable disclosure, which the People have understandably not advanced in their respondent's brief on appeal. In any case, as indicated above, we are not bound by the trial court's reasoning and examine the evidence independently to determine whether the motion was properly denied.

Probable Cause to Arrest

Defendant again advances the argument he made in the trial court—that there were insufficient grounds to arrest him and therefore the search of his cell phone was not made incident to a lawful arrest.

" 'Probable cause exists when the facts known to the arresting officer would persuade someone of "reasonable caution" that the person to be arrested has committed a crime. [Citation.] "[P]robable cause is a fluid concept—turning on the assessment of probabilities in particular factual contexts . . . ." [Citation.] It is incapable of precise definition. [Citation.] " 'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt,' " and that belief must be "particularized with respect to the person to be . . . seized." ' " (*People v. Scott* (2011) 52 Cal.4th 452, 474.)

The requirement for particularized suspicion does not mean an arresting officer must first obtain evidence against a particular defendant that would win the day in court. The cause required is "probable." (*Maryland v. Pringle* (2003) 540 U.S. 366, 371 (*Pringle*).) " ' "[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation . . . . It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the quanta . . . of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. [Citation.] Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the [probable-cause] decision.' " (*Ibid.*; see also *In re Charles C.* (1999) 76 Cal.App.4th 420, 423.)

As relevant in this case, a defendant may be lawfully arrested if he is observed as part of a group of individuals believed to be jointly engaged in a criminal act. (*Pringle*, *supra*, 540 U.S. at pp. 372–373.) Simply being near criminal activity does not amount to probable cause. (*Ibid.*; *Ybarra v. Illinois* (1979) 444 U.S. 85, 91 [when warrant allowed search of tavern and its owner, police could not search patrons]; *United States v. Di Re* (1948) 332 U.S. 581, 594 [when informant only singled out one person, other passenger in car could not be searched].) However, being observed as part of a distinct group,

where there are signs of a criminal enterprise, is another matter. (*Pringle*, *supra*, at pp. 371–374 ["any or all" of three men in car could be arrested for possession of contraband found throughout passenger compartment of car when quantity of drugs and cash indicated dealing that a perpetrator would seek to hide from innocents]; *People v. Schmitz* (2012) 55 Cal.4th 909, 924 ["the law does not presume that a front seat passenger has nothing to do with items located elsewhere in the passenger compartment of a car"].)

In *People v. Hughes* (1966) 240 Cal.App.2d 615, for example, police received a tip about gambling taking place. While standing on the sidewalk outside the reported location, police heard statements suggestive of gambling emanating from within. Believing there was a dice game in progress, police approached the apartment door. Through a crack beneath the doorbell, they observed "several persons, some standing and some sitting, engaged in rolling dice and, after the dice throws, passing money among them." (*Id.* at pp. 616–617.) The police then arrested the occupants for gambling. (*Id.* at p. 617.) The appellate court concluded, "[t]he language heard by the officers was, itself, sufficient to give them reasonable cause to believe that the offense of gambling was then and there being committed." (*Ibid.*)

Under *Pringle*, *supra*, 540 U.S. at pages 371–374, and *Hughes*, *supra*, 240 Cal.App.2d at pages 616–617, there was probable cause to arrest defendant for gambling. He was a part of a distinct, 10-person group standing in a circle around dice and money. Defendant was not simply near the group—he was not merely walking or parked nearby. Rather, he was an integrated part of it. The police thus had a reasonable basis for believing defendant was engaged in gambling.

Furthermore, the police observed more than the discrete group of men around the dice and money. When the officers approached, the men fled, including defendant. While merely walking away from an officer is not a basis for a detention or arrest, running from a scene where unlawful activity is occurring does, indeed, add to the calculus of probable cause for arrest. (See *People v. Allen* (2000) 78 Cal.App.4th 445,

450; *People v. Watkins* (1994) 26 Cal.App.4th 19, 28; *People v. Mims* (1992) 9 Cal.App.4th 1244, 1249.)

Accordingly, given the totality of the scene the officers observed, including defendant's flight, there was ample probable cause for his arrest.

Warrantless Search

It has long been recognized that certain searches incident to a lawful arrest do not require a warrant. However, about a year after defendant's arrest and search of his cell phone, and after the trial in this case, the United States Supreme Court, in *Riley v. California* (2014) __ U.S. __ [134 S.Ct. 2473, 2482–2484] (*Riley*), addressed "how the search incident to arrest doctrine applies to modern cell phones." (*Id.* at p. 2484.) The court concluded the typical justifications for such searches, avoiding harm to officers and preserving evidence, do not justify the search of a cell phone's digital contents. (*Id.* at pp. 2484–2485.) Accordingly, the court held a warrant is generally required before reviewing data from a seized cell phone. (*Id*. at p. 2485, 2493.) Thus, on appeal, defendant argues that, under *Riley*¸ the warrantless search of his cell phone was unlawful, even assuming his arrest was lawful.

Although *Riley* holds a warrant must generally be obtained to search cell phone data, that does mean the exclusionary rule necessarily applies in this case. The rule is a judicially-created penalty meant to deter police misconduct. Courts will not apply it to exclude the fruits of "searches conducted in objectively reasonable reliance on binding appellate precedent," even if that precedent is "later overruled." (*Davis v. United States* (2011) __ U.S. __ [131 S.Ct. 2419, 2423–2424].) For such "good faith" searches, "suppression would do nothing to deter police misconduct . . . and . . . would come at a high cost to both the truth and the public safety." (*Id.* at pp. 2423, 2428.)

Here, there was precedent allowing cell phone searches incident to a lawful arrest, namely *People v. Diaz* (2011) 51 Cal.4th 84 (*Diaz*). This decision by the California Supreme Court, which was good law at all times relevant to defendant's case, held, "under the United States Supreme Court's [then] binding precedent" the warrantless search of the contents of an arrestee's cell phone was valid, finding "no legal basis for

distinguishing the contents of an item found upon an arrestee's person from either the seized item itself." (*Id.* at pp. 93, 99, 101.)

Defendant nevertheless contends *Diaz* was not "binding" appellate precedent because one federal district court, in an unpublished decision in 2007, reached the opposite conclusion and ruled a cell phone could not be searched without a warrant. (*United States v. Park* (N.D. Cal., May 23, 2007, No. CR 05-375SI) 2007 WL 1521573, at *7–*8 (*Park*)). Whether the California Supreme Court's 2011 decision in *Diaz* can underpin a good faith exception to the exclusionary rule is currently before our Supreme Court. (*People v. Macabeo* (2014) 229 Cal.App.4th 486, review granted Nov. 25, 2014, S221852.)

At this juncture, we agree with the federal district courts, including the same district that decided *Park*, that *Diaz*, indeed, justifies invocation of the "good faith exception" to the exclusionary rule in cases predating *Riley*. (See, e.g., *United States v. Garcia* (N.D. Cal. Sept. 12, 2014, No. 13-CR-00601-JST-1) __ F. Supp.3d __ [2014 WL 4543163, at *6–*7] (*Garcia*) ["*Diaz* provide[d] sufficient 'binding appellate precedent' " to California police]; *United States v. Peel* (E.D. Cal. Aug. 25, 2014, No. 2:14-CR-00192-GEB) 2014 WL 4230926, at *7 [same].)

As *Davis*, itself, explains, a state's highest court may issue binding appellate decisions on Fourth Amendment questions. (*Davis*, *supra*, 131 S.Ct. at p. 2433 [noting overruled authority will routinely come from a "State Supreme Court"].) Indeed, where, as here, a defendant is arrested by California law enforcement officers and is subject to California's criminal justice system and its state courts, the California Supreme Court's decision in *Diaz* was unquestionably the applicable authority, and a federal district court nonpublished ruling did not create a "split" of authority within California. (*People v. Cleveland* (2001) 25 Cal.4th 466, 480 [California courts are not bound by " ' "lower federal courts, even on federal questions" ' "]; see also *Garcia*, *supra*, 2014 WL 4543163 at p. *6 [rejecting argument *Diaz* was non-binding in federal court when investigation done by state law enforcement for likely prosecution in state court]; *United States v.*

Wilford (D. Md. 2013) 961 F.Supp.2d 740, 764 [state court decision binding given state involvement in investigation].)

It is, moreover, entirely reasonable for California to train its law enforcement personnel to follow the directives of our Supreme Court, until told otherwise by either that court or the United States Supreme Court. (*Davis, supra,* 131 S.Ct. at p. 2429 ["when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities"].)

In sum, we cannot say the police in this case exhibited the kind of " 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights" the exclusionary rule is meant to punish and deter. (*Davis, supra,* 131 S.Ct. at p. 2427.) This "absence of police culpability dooms [defendant's] claim." (*Id.* at p. 2428.)

Denial of Continuance

During trial, specifically on July 9, 2013, the prosecution put into evidence a report showing a woman named Chanelle Henley was the registered owner of the Glock found at the gambling scene in April 2013, but it had been reported as stolen nearly a year before that incident. Defense counsel was unsure whether the report had been presented at the April 29, 2013, preliminary hearing. But it apparently had been, and defendant has not challenged this fact on appeal. In any case, after seeing the report at trial, defendant thought he recognized Henley's name and asked defense counsel to investigate. An investigation uncovered Henley was dating, at the time of defendant's arrest and trial, Dorian Mathis, another one of the individuals apprehended at the gambling scene.

Six days after the ownership evidence was introduced, defense counsel informed the trial court Henley had been subpoenaed to testify. Later that afternoon, the prosecutor disclosed Henley was the subject of an ongoing criminal investigation and stated he intended to ask inculpatory questions while attempting to impeach her on cross-examination. At an Evidence Code section 402 hearing outside the presence of the jury the next day, July 16, it was conceded Henley would testify about her ownership of the

gun and her relationship with Mathis. The trial court then invited the prosecutor to question the potential witness. Henley asserted her Fifth Amendment right to not incriminate herself, and the trial court ruled Henley could therefore not be fairly called as a defense witness.

Defendant then asked for a continuance of the trial to get Henley's certified DMV records to show to another, yet unknown, witness who could match Henley with the Henley on the gun ownership documents and describe her relationship with Mathis. Defendant acknowledged the lateness of the request, but argued Henley's name had not struck him as important until he saw it during the preceding week of trial and he had learned Henley would likely invoke the Fifth Amendment only the day before. Defendant believed he could have a witness "shortly," but it would take about five days to get DMV records. The prosecutor objected on the basis of relevance. The trial court denied the request for a continuance, mainly because it viewed the proffered testimony as lacking sufficient relevance, given the report stating the gun had been stolen before the incident. The trial court thought any questions regarding the theft and Henley as a sham purchaser would confuse the jury.

" 'A motion for continuance should be granted only on a showing of good cause. (§ 1050, subd. (e).)' [Citation.] To support a continuance motion to secure a witness's attendance at trial, a showing of good cause requires a demonstration, among other things, that the defendant exercised due diligence to secure the witness's attendance." (*People v. Wilson* (2005) 36 Cal.4th 309, 352.)

" '[T]he decision whether or not to grant a continuance of a matter rests within the sound discretion of the trial court. [Citations.] The party challenging a ruling on a continuance bears the burden of establishing an abuse of discretion, and an order denying a continuance is seldom successfully attacked. [Citation.] [¶] Under this state law standard, discretion is abused only when the court exceeds the bounds of reason, all circumstances being considered. [Citations.] Moreover, the denial of a continuance may be so arbitrary as to deny due process. [Citation.] However, not every denial of a request for more time can be said to violate due process, even if the party seeking the

continuance thereby fails to offer evidence. [Citation.]' (*People v. Beames* (2007) 40 Cal.4th 907, 920–921 . . . .) '[T]he trial court may not exercise its discretion 'so as to deprive the defendant or his attorney of a reasonable opportunity to prepare.' [Citation.]" (*People v. Doolin* (2009) 45 Cal.4th 390, 450 . . . .)' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 650.)

Even assuming a witness testifying as defendant hoped would provide relevant evidence—perhaps suggesting Mathis, not defendant, might have been the individual who possessed the Glock found on the evening of April 9, 2013—the problem here is that no such witness was known or identified on July 16 when defendant sought a continuance. Nor did defendant exercise due diligence to discover and secure such a witness's attendance after the report identifying Henley as the registered owner was introduced on April 29, 2013, at the preliminary hearing. (*People v. Howard* (1992) 1 Cal.4th 1132, 1171 (*Howard*) [denial of continuance proper for two reasons: no evidence a witness existed who could offer the hoped-for testimony and lack of diligence].) Defendant had more than two months to investigate the significance of Henley's ownership and the reported theft of the Glock, and he could hardly have been surprised that Henley refused to provide testimony against herself or her supposed boyfriend. In addition, a midtrial continuance of five days at a minimum would inconvenience the jurors. (*People v. Fuiava, supra,* 53 Cal.4th at p. 651.) Accordingly, the trial court's denial of a continuance was not an abuse of discretion.

Nor "did the court's ruling deny defendant his federal constitutional rights to due process and compulsory process." (*Howard*, *supra*, 1 Cal.4th at p. 1171.) "In this case, defendant could not show that he had been diligent in securing an expert witness's attendance, that a substitute would be available within a reasonable time, or that any witness, assuming one could be found, would say something material and helpful to the defense. Under these circumstances, '[g]iven the deference necessarily due a state trial judge in regard to the denial or granting of continuances,' the court's ruling does not support a claim of error under the federal Constitution." (*Id.* at p. 1172; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 352.)

DISPOSITION

The judgment is affirmed.

_____
Banke, J.

We concur:

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Humes, P. J.

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Margulies, J.